

Hon. Rebecca Berch (ret.)
1501 W. Washington St., Ste. 410
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32)	Supreme Court # R-16-0013
OF THE RULES OF THE)	
SUPREME COURT OF ARIZONA)	Amended Petition
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_____)	

Nine comments appeared on the Court's Rules Forum during the first comment period, which ended on April 1, 2016. (One commenter filed two comments on the same day, which Petitioner considers a single comment.) This Amended Petition responds to those comments. A revised version of Rule 32 that adopts particular suggestions in the comments, as explained in Part III of this Amended Petition, is in the Appendix.

Part I: Summary of the comments. The State Bar of Arizona filed a comment. Two current governors on the State Bar's Board of Governors filed separate comments. A judicial member of the Bar filed a comment that was cosigned by 54 judges and attorneys in Gila, Graham, and Cochise counties. The Mohave County Bar Association filed a comment and the Institute for Justice, a

public policy advocate, filed another comment. Three individual attorney members of the Bar also filed comments. While the Court will consider these comments in their entirety, briefly stated, the comments took the following positions.

1. A governor recommended no changes in Rule 32 and said, “The proposals address problems that don’t exist.”

2. Similarly, the comment from the judicial member, which had dozens of cosigners, disagreed that the current board was too big and noted that the Task Force report did not identify any specific failure of current board governance. This comment and others prefer that the Court maintain the current level of rural county representation on the board.

3. The comment from the Institute for Justice contended that “the current form of the ‘integrated’ bar does nothing to protect the public,” and suggested reorganizing the State Bar as a “purely regulatory agency.”

4. An attorney supported the view of the Institute for Justice, but added that a smaller board “is eminently more efficient, so if there is to be a governing board, by all means let it be a smaller one.” Another attorney said that the State Bar “serves neither the members nor the public,” and that restructuring the State Bar’s governance “is an exercise in futility.”

5. Three comments supported proposed governance “Option Z,” but one of those comments included a caveat that the board size and representation should not change at all.

6. The State Bar’s comment favored the Board of Governors’ proposal.

II. Response to the comment from the Institute for Justice. A representative of the Institute for Justice (“the Institute”) served as a member of the Mission and Governance Task Force established by Administrative Order number 2014-79. The Institute’s comment on the Rules Forum included a June 11, 2015 letter from that member; the same letter was included as an appendix to the Task Force’s September 1, 2015 report to the Supreme Court. Task Force members discussed the Institute’s June 11, 2015 letter at their July 8, 2015 meeting, and Petitioner acknowledged that the letter was thoughtful and eloquent (July 8, 2015 meeting minutes, at page 2). Nonetheless, “over the course of the Task Force meetings, the majority of its members have concluded by an overwhelming vote (that is, with only one dissenting vote) that the current integrated bar model works well and should be maintained.” (Minutes, *id.*, at page 4) Petitioner concurs with the conclusion of the Task Force’s majority.

However, Petitioner believes the Institute’s position concerning lobbying activities of the State Bar expresses a point of view on which reasonable people may disagree. Although the Bar tries diligently to be “*Keller* pure” – that is, to not

engage in political speech unrelated to the administration of justice – where to draw the line between permissible lobbying and inappropriate advocacy cannot be ascertained with precision. The Institute maintains that the State Bar “spend[s] its members’ dues on lobbying, electioneering, and other political speech, most prominently about the continued existence of the integrated bar itself and merit selection of judges.” (At page 21) It maintains that these activities are impermissible. To ameliorate the concerns of those bar members who hold this view, Petitioner proposes an amendment to Rule 32(c)(8), “Membership/Computation of Fee.” The proposed amendment shown in the Appendix would allow members to be given the option of paying that portion of State Bar dues allocable to lobbying expenses, so that members could choose whether to support the Bar’s political activities.

Part III: Response to the State Bar’s comment. The R-16-0013 petition averred that there had been no objections to nine of the Task Force’s recommended amendments to Rule 32. The State Bar has clarified that the State Bar agrees with six of those nine recommendations.

(a) Recommendations on which the State Bar agrees:

- 1.** Implementing a regular 3-year election and appointment cycle;
- 2.** Allowing active out-of-state members to vote;

3. Allowing the immediate past president to serve a one-year term as an advisor to the board, with the State Bar's recommended qualification that an immediate past president who has time remaining on his or her term as a board member be allowed to continue to serve as a voting member of the board (see the modification to Rule 32(e)(8) in the Appendix);

4. Limiting board members to 3 terms of 3 years each, and thereafter a 3-year interval before seeking a fourth term;

5. Adding a requirement that an attorney board member have no record of disciplinary sanctions (as described in Rule 60) for 5 years preceding board service; and

6. Allowing removal of a board member for good cause by a two-thirds vote of the board.

(Petitioner proposed an amendment to Rule 32(c)(6) that would allow judicial member status for full-time tribal court judges, like the other judicial officers mentioned in that rule. Neither the State Bar nor others commented in opposition to this proposal.)

(b) Recommendations on which the State Bar disagrees:

1. The petition recommended eliminating two vice-presidents from the current 5 officer positions, which would result in 3 officers. The State Bar recommends combining the two vice-president positions, which would result in 4

officers. For the reasons cited in the State Bar's comment, Petitioner agrees with this change. Revised Rules 32(e)(8), 32(f)(1), 32(f)(2)(B), and 32(f)(3) in the Appendix show this change.

2. The petition recommended that the board not elect an officer to a second term for any office he or she held previously. The State Bar questioned this recommendation and emphasized that the person may be well qualified to serve a second term in office. The comment also noted that the recommendation would eliminate the option to allow a past officer to fill a partial term. Petitioner revised proposed Rule 32(f)(2)(D) shown in the Appendix to allow an officer to serve a partial term, in addition to one full term.

3. Option Z in the petition proposed a change to the manner of appointment of public members on the board. The board itself currently appoints its public members. Under Option Z, the board would nominate public members, but the Supreme Court would appoint them. The State Bar's comment disagrees with this proposal. It contends that the board best knows what specialized knowledge it needs from its public members and that it has "historically appointed stellar public members."

Petitioner continues to believe that the Supreme Court should appoint the public members of the board. The Court's appointment of the board's public members will enhance the Court's supervision and oversight of the State Bar,

which will further protect the public. Petitioner believes the Court should adopt this particular change to Rule 32 regardless of what it decides on the other issues raised by this Petition, and even if it makes no other changes to Rule 32. If the board has “historically appointed stellar public members,” it also should be successful in nominating stellar public members for the Court’s consideration.

4. The State Bar’s comment supported the board’s proposal for a governing board of 26 voting members. (The current board is composed of 26 voting members.) Petitioner notes again an observation in a November 11, 2015 letter from the board’s president to the Chief Justice that the board’s proposal passed narrowly, by a vote of 11 to 9.

Accordingly, Petitioner continues to request the Court’s consideration of a “modified Option Z,” which was explained in the initial petition. Modified Option Z has the following features:

- The board’s size would be reduced to 18 voting members;
- The board would include, as it does now, 4 appointed public members and 3 appointed at-large members, but because of a reduction in the board’s size, these members (who all could be appointed by the Court) would make up a higher percentage of the board than currently;
- The board would have 10 attorney members elected from 5 reconfigured districts;

- The board would include as an eleventh elected member the president of the Young Lawyers Division (the attached draft refers to the Young Lawyers by their correct name, a “Division,” rather than a “Section”);
- The deans of Arizona’s 3 law schools would serve as non-voting, ex officio members (the State Bar’s proposal would eliminate those seats).

The Task Force’s September 1, 2015 report to the Court noted that its review of the State Bar “was not occasioned by perceived problems with the current system.” However, the Task Force believed that the State Bar’s governance could be improved. Option Z was proposed by the Task Force as a significant step in that direction.

5. Finally, Petitioner proposed a new Rule 32(m) concerning public meetings and records. The proposed provision simply states, “The State Bar will conduct meetings and maintain records pursuant to public access policies adopted by the Supreme Court.”

The State Bar’s comment supported the adoption of a public access policy, but it expressed concern with proposed language for that policy. Petitioner is confident that the Court will moot the State Bar’s concerns by seeking input from the State Bar and the public before adopting the public access policies.

Part IV. Conclusion. A second round of comments will follow this Amended Petition. The second comment period will conclude on June 10, 2016, and if appropriate, Petitioner will file a reply to those comments.

RESPECTFULLY SUBMITTED this __ day of May, 2016

By _____
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Appendix

Please note: This Appendix shows only revisions to the “clean” version of proposed Rule 32 attached as Appendix 4 to the original petition. Those revisions affect Rules 32(c)(8), 32(e)(3), 32(e)(8), 32(f)(1), 32(f)(2)(B), 32(f)(2)(D), and 32(f)(3).

Rule 32. Organization of State Bar of Arizona

(a) State Bar of Arizona. The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona.

(1) Practice of law. Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.

(2) Mission. The State Bar of Arizona serves and protects the public and enhances the legal profession by promoting the competency, ethics, and professionalism of its members and enhancing the administration of and access to justice. To accomplish its mission, this Court empowers the State Bar of Arizona, under the Court’s supervision, to

(A) Organize and promote activities that fulfill the responsibilities of the legal profession and its individual members to the public;

(B) Promote access to justice for those who live, work, and do business in this state;

(C) Aid the courts in the administration of justice;

(D) Assist this Court with the regulation and discipline of persons engaged in the practice of law; foster on the part of those engaged in the practice of law ideals of integrity, learning, competence, public service, and high standards of conduct; serve the professional needs of its members; and encourage practices that uphold the honor and dignity of the legal profession;

(E) Conduct educational programs regarding substantive law, best practices, procedure, and ethics; provide forums for the discussion of subjects pertaining to the administration of justice, the practice of law, and the science of jurisprudence; and report its recommendations to this Court concerning these subjects.

(b) Definitions. [No change]

(c) Membership.

(1) through (5) [No change]

(6) *Judicial Members.* Judicial members shall be justices of the Supreme Court of Arizona, judges of the Court of Appeals and Superior Court of Arizona and of the United States District Court for the District of Arizona. Judicial membership status shall likewise be accorded to members of the State Bar who are full-time commissioners, city or municipal court judges, tribal court judges, pro tempore or justices of the peace in the state of Arizona not engaged in the practice of law, or justices or judges of other courts of record of the United States or of the several states. Judicial members shall hold such classification only so long as they hold the offices or occupations entitling them to such membership. Judicial members shall be entitled to vote but shall not be entitled to hold office. Judicial members shall have such privileges, not inconsistent with the rules of this court, as the board provides. A judicial member who retires or resigns from the bench shall become an active member subject to all provisions of these rules.

(7) [No change]

(8) *Computation of Fee.* The annual membership fee shall be composed of an amount for the operation of the activities of the ~~state-bar~~ State Bar and an amount for funding the Client Protection Fund, each of which amounts shall be stated and accounted for separately. Each active and inactive member, who is not exempt, shall pay the annual Fund assessment set by the court, to the ~~state-bar~~ State Bar together with the annual membership fee, and the ~~state-bar~~ State Bar shall transfer the fund assessment to the trust established for the administration of the Client Protection Fund. The annual member fee statement shall specify that a member may opt not to pay that portion of the annual fee allocated to the State Bar's lobbying activities. The executive director shall calculate that portion, and shall include on the fee statement the dollar amount of the annual fee reduction if the member opts not to pay that portion.

(9) through (12) [No change]

(d) Powers of Board. The State Bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this Court. The board shall:

- (1) Fix and collect, as provided in these rules, fees approved by the Supreme Court, which shall be paid into the treasury of the State Bar.
- (2) Promote and aid in the advancement of the science of jurisprudence, the education of lawyers, and the improvement of the administration of justice.
- (3) Approve budgets and make appropriations and disbursements from funds of the State Bar to pay expenses necessary for carrying out its functions.
- (4) Formulate and declare rules and regulations not inconsistent with Supreme Court Rules that are, necessary or expedient to enforce these rules, and by rule fix the time and place of State Bar meetings and the manner of calling special meetings thereof, and determine what number shall constitute a quorum of the State Bar.
- (5) Appoint a Chief Executive Officer/Executive Director to manage the State Bar's day-to-day operations.
- (6) Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.
- (7) Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the Chief Justice of this Court.
- (8) Create and maintain the Client Protection Fund, as required by this court and authorized by the membership of the State Bar April 9, 1960, said fund to exist and be maintained as a separate entity from the State Bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a Board of Trustees appointed by the Board of Governors in accordance with the terms of the trust and the trustees shall govern and administer the Fund pursuant to the provisions of the trust as amended from

time to time by the board and in accordance with such other procedural rules as may be approved by the Board of Governors.

- (9) Implement and administer mandatory continuing legal education in accordance with Rule 45.

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- **Immediately below is Rule 32(e), Task Force OPTION Z, as modified. See subsequent pages for the Board of Governors Proposal regarding Rule 32(e).**

(e) Composition of the Board of Governors. The State Bar of Arizona is governed by a board of governors. The board is composed of eleven elected governors and seven appointed governors, as provided by this Rule. Only governors elected or appointed under this Rule are empowered to vote at board meetings.

- (1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board each year.

(2) Elected governors.

(A) Districts. Governors are elected from five districts, as follows:

- (i)** Maricopa County District: five governors
- (ii)** Pima County District: two governors
- (iii)** North District (Mohave, Coconino, Navajo, and Apache Counties): one governor
- (iv)** West District (Yavapai, Yuma, and La Paz Counties): one governor
- (v)** Southeast District: (Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties): one governor

(B) Qualifications. Each elected governor must be an active member of the State Bar of Arizona throughout the elected term. Each elected governor must have been an active State Bar member and have had no record of disciplinary sanctions under Rule 60 for five years prior to election to the board.

(C) Nominations. Nominations for elected governor shall be by petition signed by at least five active State Bar members. Each candidate named in a petition

and all members signing a petition must have their main offices in the district in which the candidate seeks to be elected.

(D) Elections. Election of governors will be by ballot. Active and judicial members are entitled to vote for the elected governor or governors in the district in which a member has his or her principal place of business, as shown in the records of the State Bar. Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if none, in the Maricopa County District. The State Bar will send ballots electronically to each member entitled to vote, at the address shown in the records of the State Bar, at least two weeks prior to the date of canvassing the ballots. Members will return their ballots through electronic voting means, and the State Bar will announce the results at the ensuing annual meeting. The State Bar's bylaws will direct other details of the election process.

(E) Terms of service. Elected governors serve a three-year term. An elected governor serves on the board until a successor is elected and takes office at the annual meeting. If the board receives notice that an elected governor's principal place of business has moved from the district in which the governor was elected, or that the governor has died, become disabled, or is otherwise unable to serve, that governor's seat is deemed vacant, and the other elected and appointed governors will choose a successor by a majority vote.

(F) Term limits. An elected governor may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service. Election or succession to a partial term of less than three years will not be included in calculating a member's term limit.

(3) Young Lawyers ~~Section~~ Division President. In addition to those governors elected under Rule 32(e)(2), the elected president of the Young Lawyers ~~Section~~ Division will serve as a voting member of the board of governors. The election of the Young Lawyers ~~Section~~ Division president will be conducted as provided by Rule 32(e)(2)(C), except that only members of the Young Lawyers ~~Section~~ Division are entitled to vote in that election. The Young Lawyers ~~Section~~ Division president will serve a one-year term on the board.

(4) Appointed governors. The Supreme Court will appoint public and at-large governors, collectively referred to as “appointed governors,” to serve on the board.

(A) Public governors. Four governors of the board are designated as “public” governors. The public governors must not be members of the State Bar and must not have, other than as consumers of legal services, a financial interest in the practice of law. Public governors are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee and may appoint as a public governor a person who was not nominated by the board. No more than two public governors may be from the same district. No individual may serve more than two terms as a public governor. The Court may fill a vacancy in an uncompleted term of a public governor, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

(B) At-large governors. Three governors on the board are designated as “at-large” governors. At-large governors, who may be former elected or public governors, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large governors to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large governor.

(5) Oath of governors. Upon commencing service, each governor, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a governor.

(6) Removal of a governor. A governor of the board may be removed for good cause by a vote of two-thirds or more of the governors cast in favor of removal. Good cause for removal exists if a governor undermines board meetings or actions or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a discipline sanction under Rule 60, repeatedly ignoring the duties of a governor, or disorderly activity during a board meeting. A board governor so removed may, within thirty days of the board’s action, file a petition pursuant

to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination of good cause. The Court will expedite consideration of the petition.

(7) Recusal of an attorney governor. An attorney board member who is the subject of either a probable cause order issued pursuant to Rule 55(c)(1)(E) or an agreement for discipline by consent filed pursuant to Rule 57(a) must recuse him- or herself from serving on the board pending disposition of the matter.

(8) Board advisor. The immediate past president of the board will serve a one-year term as an advisor to the board. The advisor may participate in board discussions but has no vote at board meetings, except an immediate past president may continue to vote if his or her term as an elected board member has not expired. The board advisor, with the assistance of two or more governors chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect, vice-president, and secretary-treasurer.

(9) Ex officio members. The dean of each ABA-accredited law school in Arizona will serve as an ex officio member of the board. An ex officio member may participate in board discussions but may not vote at board meetings.

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➤ **Immediately below is Rule 32(e) as proposed by the Board of Governors.**

(e) Composition of the Board of Governors. The State Bar of Arizona is governed by a board of governors. The board is composed of nineteen elected governors and seven appointed governors, as provided by this Rule. Only governors elected or appointed under this Rule are empowered to vote at board meetings.

(1) Implementation. The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board each year.

(2) Elected governors.

(A) Districts. Governors are elected from four districts, as follows:

- (i) Maricopa County District: ten governors
- (ii) Pima County District: four governors
- (iii) All Division One counties except Maricopa: three governors
- (iv) All Division Two counties except Pima: one governor

(B) Qualifications. [No change from Option Z]

(C) Nominations. [No change from Option Z]

(D) Elections. [No change from Option Z]

(E) Terms of service. [No change from Option Z]

(F) Term limits. [No change from Option Z]

(3) Young Lawyers ~~Section~~ Division President. The elected president of the Young Lawyers ~~Section~~ Division will serve as a voting member of the board of governors in addition to those governors elected under Rule 32(e)(2). The election of the Young Lawyers ~~Section~~ Division president will be conducted as provided by Rule 32(e)(2)(C), except that only members of the Young Lawyers ~~Section~~ Division are entitled to vote in that election. The Young Lawyers ~~Section~~ Division president will serve a one-year term on the board.

(4) Appointed governors. The Supreme Court will appoint at-large governors, and the board will appoint public governors, collectively referred to as “appointed governors,” to serve on the board.

(A) Public governors. Four governors of the board are designated as “public” governors. The public governors must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public governors are appointed by the board for terms of three years and begin board service at a time designated by the board. No more than two public governors may be from the same district. No individual may serve more than two terms as a public governor. The board may fill a vacancy in an uncompleted term of a public governor, but appointment of a public member

to a term of less than three years will not be included in a calculation of the member's term limit.

(B) At-large governors. Three governors on the board are designated as "at-large" governors. At-large governors, who may be former elected or public governors, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large governors to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large governor.

(5) Oath of governors. [No change from Option Z]

(6) Removal of a governor. [No change from Option Z]

(7) Recusal of an attorney governor. [No change from Option Z]

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(f) Officers of the State Bar.

(1) Officers. The board will elect its officers. The officers are a president, a president-elect, a vice-president, and a secretary-treasurer. An elected or at-large governor may serve as an officer.

(2) Terms of office.

(A) President. The term of the president will expire at the conclusion of the annual meeting. The president-elect whose term expired at the same annual meeting will then automatically become, and assume the duties of, president at that time.

(B) President-elect, vice-president, and secretary-treasurer. The board must elect a new president-elect, a new vice-president, and a new secretary-treasurer at each annual meeting. Those newly elected officers will assume their respective offices at the conclusion of the annual meeting at which they are elected, and they will continue to hold their offices until the conclusion of the subsequent annual meeting at which their successors are elected.

(C) Length of term. Each officer will serve a one-year term.

(D) Successive terms. A governor may not be elected to a second full term for any office that the governor has held during the preceding nine or fewer consecutive years of service on the board. However, a governor may serve a partial term under Rule 32(f)(5), either before or after service of one full term.

(E) Limitations. The term of a governor chosen as president or president-elect automatically extends until completion of a term as president if his or her term as a governor expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new governor for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or appointment of a successor governor shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).

(3) Duties of officers. The president will preside at all meetings of the State Bar and of the board of governors, and if absent or unable to act, the president-elect will preside. Additional duties of the president, president-elect, vice-president, and secretary-treasurer may be prescribed by the board or set forth in the State Bar bylaws.

(4) Removal from office. An officer may be removed from office, with or without good cause, by a vote of two-thirds or more of the members of the board of governors cast in favor of removal.

(5) Vacancy in office. A vacancy in any office before expiration of a term may be filled by the board of governors at a meeting called for that purpose.

(g) Annual meeting. [No change]

(h) Administration of rules. Examination and admission of members shall be administered by the committee on examinations and the committee on character and fitness, as provided in these rules. Discipline, disability, and reinstatement matters shall be administered by the Presiding Disciplinary Judge, as provided in these rules. All matters not otherwise specifically provided for shall be administered by the board.

(i) Filings made. [No change]

(j) Formal Requirements of Filings. [No change]

(k) Payment of Fees and Costs. The payment of all fees, costs, and expenses required under the provisions of these rules relating to membership, mandatory continuing legal education, discipline, disability, and reinstatement shall be made to the State Bar. The payment of all fees costs and expenses required under the application for admission to the practice of law, examinations and admission shall be made to the finance office of the administrative office of the courts.

(l) Expenses of Administration and Enforcement. [No change]

(m) Meetings and Records. The State Bar will conduct meetings and maintain records pursuant to public access policies adopted by the Supreme Court.